No. 47994-0-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

JOHN R. TONEY,

Appellant,

v.

LEWIS COUNTY; LEWIS COUNTY DISTRICT COURT, ET AL.; LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE, ET AL.; J. DAVID FINE; PAMELA SHIRER; JUST HAZEL DOE; IRENE WHITMAN; JANE DOE'S 1-10; and JOHN DOES'S 1-8,

Respondents.

Appeal from the Superior Court of Washington for Lewis County

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Respondents' Brief

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I. ISSUES BEFORE THE COURT

Toney raises three issues in this appeal:

1. Was Judge Evans acting "in the improper venue of Cowlitz County without an order of change of venue," thus vitiating his rulings in the court below?

2. Did Judge Evans err in "allowing a named party to serve process"?

3. Did Judge Evans err in finding that Toney failed to establish that he had substantially complied with the tort claim notice statute's 60-day notice rule?

II. FACTS OF THE CASE

Plaintiff/Appellant John R. Toney ("Toney") alleges that in 2004, Lewis County Superior Court awarded him costs and fees in the amount of $622.55 in respect of a RALJ appeal from Lewis County District Court.[1] There is no allegation (nor evidence in the record) that this sum ever was reduced to a judgment.[2] Nothing whatever transpired for nine years. Then early in 2015 Toney presented papers to the Lewis County District Court Clerk in an attempt to garnish that sum as against the District Court. The District Court Clerk and her staff declined to issue such a garnishment.[3]

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[1] Appellant's Amended Brief 3.

[2] Amended Complaint 2:11-17, CP 5.

[3] Amended Complaint 2:19, CP 5.

On April 15, 2015, Toney filed a $1 million tort claim notice with the Lewis County Risk Manager.[4] His claim never was denied; in fact, he never received any response from the Risk Manager. Exactly a month later, on May 15, 2015 – and only 31 days into the 60-day tort claim notice period[5] – Toney served Complaint and Summons upon the County, the District Court, and the District Court's staff (who are Respondents in this appeal).[6] Toney had not filed his Complaint nor had he had not paid a filing fee. A demand to file was tendered to Toney per CR 3(a);[7] and on May 27, 2015 – 47 days into the 60-day tort claim notice period – Toney filed an Amended Complaint.[8]

The Amended Complaint differed from the Complaint in only one regard: it added as defendants civil deputy prosecutor Fine, who

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[4] CP 19-20.

[5] RCW 4.96.020(4): "No action subject to the claim filing requirements of this section shall be commenced against any local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct until sixty calendar days have elapsed after the claim has first been presented to the agent of the governing body thereof."

[6] CP 21-25 (Exhibit to Declaration in Support of Defendants' Motion for Summary Judgment, filed and dated May 29, 2015).

[7] CP 26.

[8] CP 4-8

responded to Toney's initial complaint on behalf of the defendants; and also the Prosecuting Attorney's Office. Significantly, the Amended Complaint did not recite the basis upon which Toney claimed to be entitled to relief of any kind from these two additional defendants.

Each of the three Lewis County Superior Court Judges recused himself.[9] Thereupon His Honor Judge Michael H. Evans of Cowlitz County was assigned by Lewis County Superior Court to hear the case.[10] Judge Evans issued summary judgment against Toney and in favor of all defendants on July 7, 2015, ruling that Toney had failed to discharge his burden of proving that his failure to allow the statutory 60-day tort claim notice period to run was excused for substantial compliance.[11] Toney's Motion for Reconsideration Subsequently was heard by Judge Evans, and an Order Denying Reconsideration was entered exactly one month later, on August 8, 2015.[12]

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[9] CP 27-29.

[10] CP 30.

[11] CP 140-195. The formal Order Granting Defendants' Motion for Summary Judgment was entered by the Lewis County Superior Court's Clerk on July 15, 2015, as required by RCW 2.08.200. See CP 203-05.

[12] CP 206-07.

III. STANDARD OF REVIEW

The Court will review orders granting summary judgment *de novo*.[13] Such orders will be upheld if, viewing the evidence in the light most favorable to the non-moving party there is (a) no genuine issue of material fact and (b) the moving party is entitled to judgment as a matter of law.[14] Moreover, summary judgment may issue when a court is presented with facts upon which a reasonable fact finder could reach but one conclusion.[15]

The moving party bears the initial evidentiary burden, whereupon the burden shifts to the non-moving party to show sufficient evidence to establish the validity of his contentions. If the non-moving party cannot do so, then summary judgment is appropriate.[16]

One of Toney's three grounds of appeal (Issue № 2) questions the sufficiency of service of process. Whether process was

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[13] *Fizzell v. Murray,* 179 Wn.2d 301, 306, 313 P.3d 1171, 1175 (2013).

[14] *Loeffelholz v. University of Washington*, 175 Wn.2d 264, 271, 285, 857 P.3d 854 (2012).

[15] *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 546, --- P.3d --- (2016), citing *Sentinel C3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40, 46 (2014).

[16] *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624-25, 818 P.2d 1056, 1059 (1991).

validly served upon a defendant is a question of law that is reviewed *de novo* if, as in this case, the relevant facts are undisputed and the parties dispute only the legal effect of those facts.[17]

IV. ARGUMENT

A. THE STATUS OF HIS HONOR JUDGE EVANS.

Toney complains that following the Lewis County judges' recusals, a letter from Superior Court Administrator Susie Parker[18] was not an instrument adequate in law to authorize Judge Evans to preside in this case as a visiting judge of the Lewis County Superior Court. Toney contends that when she wrote a letter on behalf of the Superior Court, the Court Administrator acted without legal authority.[19]

Toney's argument is without merit.

Washington's Superior Court Judges are State judicial officers.[20] Superior Court Judges have "power in any part of the

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[17] *Farmer v. Davis*, 161 Wn. App. 420, 423, 250 P.3d 138, 144 (2011).

[18] CP 30.

[19] Appellant's Amended Brief 8-11.

[20] Except perhaps for purposes of allocating responsibility for the provision of their salaries. *Parker v. Wyman*, 176 Wn.2d 212, 221-222, 289 P.3d 628, 632-633 (2012).

state" to exercise all powers and to perform any duty "conferred or imposed upon them by statute."[21]

The Judges of the Superior Court of Washington for Lewis County acted lawfully in causing their Court Administrator to perform the ministerial act of communicating with Judge Evans on their behalf. The Presiding Judge was not legally obliged to pen this letter on behalf of himself and his colleagues; rather, he could delegate that ministerial act to court staff. A judge may take reasonable administrative measures in exercise of the power to name a visiting judge of his Superior Court.[22]

A ministerial act "is one that 'involves obedience to instructions or laws instead of discretion, judgment, or skill.'"[23] Sending a letter to advise the parties of the Court's determination of the identity of the specific visiting judge who is to sit in a cause of action is the epitome of a ministerial act. There is no reason why the writing of a letter such as this should entail any exercise of discretion. Having made the determination that a visiting judge is required, there

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[21] RCW 2.28.080(4).

[22] *State ex rel. Giles v. French*, 102 Wn. 273, 276, 172 P. 1156, 1157 (1918).

[23] *City of Wenatchee v. Owens,* 145 Wn. App. 196, 206, 185 P.3d 1218 (2008), quoting BLACK'S LAW DICTIONARY (8th ed., 1999) at 1017.

is no earthly reason why the Presiding Judge should have had to write to the parties personally to announce the Court's decision.

Additionally, the Superior Court for Lewis County never transferred venue, as Toney claims. "If the matter proceeds to trial," the Court's letter of June 14th stated, "it will be held in Lewis County . . . ."[24] Washington's venue statute only requires that an action "shall be tried in the county where the cause, or some part thereof, arose".[25] Nothing in our venue statute requires that motions be heard in the county in which a cause of action arises. Moreover, the venue statute expressly authorizes the use of a visiting judge, who normally sits in another county, to hear cases in which all of the judges of the Superior Court for the county in which the cause of action arises have recused themselves.[26]

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[24] Letter from Lewis County Superior Court Administrator Susie Parker to Plaintiff and to Defendants' Counsel dated June 14, 2015, CP 30.

[25] RCW 4.12.020.

[26] RCW 4.12.040(1): "No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case *the presiding judge* in judicial districts where there is more than one judge *shall forthwith* transfer the action to another department of the same court, or *call in a judge from some other court.* ..." (Emphasis added.)

B. DID JUDGE EVANS "ALLOW A NAMED PARTY TO SERVE PROCESS"?

The specific "process" which Toney alleges to have been improperly served consists of pleadings; specifically, a notice of appearance, a summary judgment motion and a declaration in support thereof, and a certificate of service.[27] The mode of service was mailing of true copies of these pleadings to Toney. The named party who served these documents was counsel for the County, for the District Court, and for the District Court's clerks. Toney proceeded to add Defendants' counsel as a party only after Defendant's counsel had the temerity to act on his clients' behalf in the action.

None of the "process" identified by Toney was originating process, as spoken to in CR 4. The "process" consisted entirely of "pleading[s] subsequent to the original complaint," as spoken to in CR 5. Each of these pleadings was mailed to Toney, as required by CR 5(b)(1) and (2).

In the Court below His Honor Judge Evans ruled that CR 4 only serves to require service of a summons and complaint by a

[27] Appellant's Amended Brief, 11-13.

sheriff, or by a person other than a party to an action.[28] Judge Evans further ruled that CR 5, not CR 4, sets out the manner in which the "process" identified in Toney's brief is to be served, and that the requirements of CR 4 do not apply to such pleadings.[29]

The trial judge was perfectly correct, of course. "The purpose of CR 4 is to govern the content of the summons, the procedure for service, and proof of service." [30] By contrast, "CR 5 ensures the complete exchange of all documents and materials among parties,"

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[28] Tr. 22, CP 170. Pages of the Transcript of proceedings before Judge Evans (Verbatim Report of Proceedings) as supplied to the Court by Toney are not in their proper sequence; however, all of the pages appear to be present. The pages of the Verbatim Report of Proceedings appear at the end of the Clerk's Papers in the following order:

Page numbers of Transcript	Clerk's Papers pagination
1	140
45-56	141-52
38-44	153-59
31-37	160-66
19-30	167-78
10-18	179-87
2-9	188-95

[29] Tr. 22, CP 170.

[30] Washington State Bar Association, 1 WASHINGTON CIVIL PROCEDURE DESKBOOK (3rd ed, 2014), §4.5 at page 4–10.

once the process initiating the cause of action has been filed and served.[31]

No Washington appellate court has been asked heretofore to recognize this self-evident distinction between Civil Rules 4 and 5. However, in a somewhat similar context the Oregon Supreme Court has noted that Oregon's equivalent to CR 4 (being Oregon Rule of Civil Procedure ("ORCP") 7) serves not just to assure that a defendant get originating process. Additionally, ORCP 7 guarantees that "when a summons is correctly served, the court having jurisdiction over the subject matter of the action also attains personal jurisdiction over the party served."[32]

The Oregon Court went on to rule that once personal jurisdiction thus has been attained, there is no need to serve subsequent pleadings in the manner specified in ORCP 7.[33] In Oregon the mode of service for pleadings subsequent to the summons and complaint is stipulated by rules other than ORCP 7.[34]

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[31] Washington State Bar Association, 1 WASHINGTON CIVIL PROCEDURE DESKBOOK (3rd ed, 2014), §5.5 at page 5–10.

[32] *McCall v. Kulongoski*, 339 Ore. 186, 192-93, 18 P.3d 256, 258 (2005).

[33] *McCall v. Kulongoski*, 339 Ore. at 192-93, 18 P.3d at 259.

[34] Specifically, ORCP 9 (which is the Oregon equivalent of Washington's CR 5): *McCall v. Kulongoski,* 339 Ore. at 192, 118 P.3d at 259.

This same rationale underlies and further explains the distinction between CR 4 and CR 5, and the respective scope of each of those two Rules; for in Washington too, personal jurisdiction over a defendant is secured once the summons and complaint are properly served (usually through personal service upon the defendant).[35]

C. COMPLIANCE WITH 60-DAY REQUIREMENT OF THE TORT CLAIM NOTICE STATUTE.

Toney asserts in his brief that "the claim was being denied" at the time that the Respondents filed for summary judgment. [36] However, he cites to nothing in the record to support this assertion. This claim was not raised before Judge Evans.

The 60-day waiting period may be a procedural requirement, with which substantial compliance will suffice, as has been held by a divided panel of this Division. [37] However, even if substantial compliance will suffice, the burden is on the claimant/plaintiff to prove

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[35] *Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155, 1159 (2014).

[36] Appellant's Amended Brief 15. This factual allegation was not raised in the trial court. The exhibits to Appellant's Amended Brief do not comprise a part of the record below; and this Court has issued no order in respect of those exhibits pursuant to RAP 9.11.

[37] *Lee v. Metro Parks Tacoma*, 183 Wn. App. 961, 966-67, 335 P.3d 1014, 1016-17 (2014).

that the purpose underlying the tort claim notice statute has been satisfied.[38]

In this case Toney offered no evidence that the County had completed its investigation of his claim, nor that it had decided to reject his claim. As in *Tacoma Parks,* the governing case on point, Toney had submitted no evidence to the court below that Lewis County had "taken any action at all on [his] complaint at the time [he] filed [his] amended complaint."[39] Substantial compliance cannot be inferred by the court.

Toney's argument in the court below was as follows: "622 bucks is a drop in the bucket for them. They – comes down to procedural or substantial compliance. I think I did substantially comply."[40] However, he cites no legal authority to support his position.

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[38] *Lee v. Metro Parks Tacoma*, 183 Wn.App. at 968, 335 P.3d at 1019 (2014), finding for Metro Parks Tacoma where Lee offered "no evidence that Metro Parks had taken any action at all on her claim". This Court went on to state as follows: "Because Metro Parks filed a summary judgment motion based on application of RCW 4.96.020(4), the burden shifted to Lee to come forward with evidence showing that she had substantially complied with the 60-day waiting period in that statute." 183 Wn.App. at 968, 335 P.3d at 1019.

[39] *Lee v. Metro Parks Tacoma*, 183 Wn.App. at 968, 335 P.3d at 1017 (2014).

[40] Transcript 37:20-22, CP 166.

There is no evidence before this Court to show that the purpose of the tort claim notice statute has been achieved, Plaintiff having commenced his present action with fully half of the statutory notice period still to run.[41]

Toney attaches exhibits to his Amended Brief which did not form a part of the record below. Presumably, he offers these in support of his claim that at the time he sued, "the claim was being denied". [42] However all that these exhibits show (should they, somehow, be admissible evidence before this Court) is that the County's Risk Manager and its insurer were assessing whether Toney's tort claim was "bogus or not," and to that end they had asked for it to be reviewed by the County's attorney.[43]

With respect to this issue Toney objects to a "lack of candor to the tribunal" on the part of Respondents' trial counsel. This lack of candor allegedly resided in not stating on the record that he had been involved in advising "the Members of [Lewis County] Risk

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[41] The service of an unfiled Complaint tentatively commenced this action, per CR 3; and in so doing it tolled any statute of limitations. *Nearing v. Golden State Foods Corp.*, 114 Wn.2d 817, 820, 792 P.2d 500, 502 (1990). The transaction described in the amended complaint being the same as that in the original complaint, the former related back to the date of the latter: see CR 15(c).

[42] Appellant's Amended Brief 14.

[43] Appellant's Amended Brief, exhibit 3.

Management" about the subject-matter of the litigation during the period between filing of the tort claim and premature service of a complaint.[44] However, nothing in any of the authorities Toney cites to this Court, nor any custom of the legal profession, requires that an attorney affirmatively advise a tribunal that he is not just representing his client in a court, but that he also is rendering advice to that client about the same proceedings.

V. CONCLUSION

Wherefore Respondents pray that this appeal be dismissed.

Respectfully submitted on this 21st day of July 2016.

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[44] Appellant's Amended Brief, 14.

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

JOHN R. TONEY, Appellant, vs. LEWIS COUNTY; LEWIS COUNTY DISTRICT COURT, ET AL.; LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE, ET AL.; J. DAVID FINE; PAMELA SHIRER; JUST HAZEL DOE; IRENE WHITMAN; JANE DOE'S 1-10; and JOHN DOES'S 1-8, Respondents.	NO. 47994-0-II DECLARATION OF MAILING

Ms. Lori Cole, legal assistant for J. David Fine, Senior Civil Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On July 21, 2016, the appellant was served with a copy of the Respondents' Brief by depositing same in the United States Mail, postage pre-paid, to the Appellant at the name and address indicated below:

John R. Toney
9531 Barnes Drive
Castle Rock, WA 98611

DATED this 21st day of July, 2016, at Chehalis, Washington.

Lori Cole
Lori Cole, Legal Assistant
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

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